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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1900.

W. C. LYKINS and E. W. W. LYKINS, Plaintiffs in Error,
vs.
MRS. R. McGRATH.
No. 323.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF KANSAS.

STATEMENT OF CASE, BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

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STATEMENT OF CASE.

This is a suit instituted by Plaintiffs in Error in the United States Circuit Court for the District of Kansas, to recover possession of one hundred and sixty acres of land in said District and $2,500.00 damages for the unlawful withholding of same.

On July 31st, 1899, Plaintiffs in Error filed their amended petition (Page 7, Printed Record.)

This amended petition states that Plaintiffs in Error are members of the Peoria tribe of Indians and reside in the Northern District of the Indian Territory; that Defendant in Error is a citizen of the United States and resides in the Third Division of the United States Court for the District of Kansas.

That under and by virtue of the provisions of a treaty between the United States and the Kas-kas-kia, Peoria and other confederated tribes of Indians, concluded on the 30th day of May, 1854, proclaimed August 10th, 1854, and Act of Congress approved March 3rd, 1859 (U. S. Statutes, Vol. 11, P. 430), the southeast quarter of Section No. Fifteen (15), in Township No. Seventeen (17), south of Range No. Twenty-three (23) east, in the State of Kansas, was conveyed by the United States of America by letters patent to Ma-cha-co-me-yah, or David Lykins, a member of said Peoria tribe of Indians, being "Peoria Reserve No 14." (A copy of patent attached to Petition; Printed Record, Page 8.)

That the said patent, issued under and by virtue of the 11th Section of said Act of Congress contained a clause restraining the alienation of said land by said reservee, or by his heirs, without the consent of the Secretary of the Interior, as follows:

"That said tracts shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior, for the time being."

That the said grantee, Ma-cha-co-me-yah, or David Lykins, never sold or conveyed the said land, with the consent of the Secretary of the Interior, during his lifetime, and on or about the 14th day of August, 1864, departed this life intestate, and left surviving him, as his sole heirs-at-law, his two children, plaintiffs herein, and that at his death the said land descended to and became the property of plaintiffs, who now own the same and are entitled to the immediate and exclusive possession thereof and have been ever since the 14th day of August, 1864.

That on or about the 3rd day of June, 1864, the said reservee, Ma-cha-co-me-yah, or David Lykins, attempted to convey the said land to one Baptiste Peoria by a deed of said date without the consent of the Secretary of the Interior; that the Secretary of the Interior did not give his consent to the said conveyence in any manner or approve the same during the lifetime of the said reservee, and that the said reservee at no time asked the consent of the Secretary to make the said conveyance, and never in any way requested his approval of the same after it was made, but that the same was, after the death of the said reservee, and on March 10th, 1865, presented to the said Secretary and by him approved; that the said presentation and

approval was without the knowledge or consent of these plaintiffs; that the said conveyance, having been made without the consent of the Secretary of the Interior and never having been approved by him during the lifetime of the grantor, was and is inoperative and void; that the defendant is now claiming the said land through successive conveyances from the said Baptiste Peoria and is in the unlawful possession of the same and has been since the ——— day of ————————, 1865.

That plaintiffs have been damaged by the said unlawful holding of said land by the said defendant in the sum of Twenty-five Hundred Dollars; that the value of the said land is Five Thousand Dollars, and the value of the monthly rents and profits is Thirty Dollars per month.

On August 23rd, 1899, Defendant in Error filed her demurrer to said amended complaint, stating as grounds therefor

First. Said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs or either of them and against the defendant.

Second. That said petition on its face shows that the pretended cause of action therein set forth is barred by the fourth clause of Section 10, of Chapter 95, of Volume 2, of the General Statutes of Kansas, 1897, in that this action was not commenced within fifteen years from the time the alleged cause of action accrued to the plaintiffs.

On November 22nd, 1899, the above demurrer was by the Court sustained, to which ruling of the Court, Plaintiffs in Error excepted. And not desiring to amend their petition, but announcing that they stood thereon, final judgment was rendered against them (Printed Record, Page 10.) The case was then brought to this Court by Writ of Error.

SPECIFICATIONS OF THE ERRORS RELIED ON.

The decree of the United States Circuit Court for the District of Kansas, rendered on the 22nd day of November, 1899, is erroneous and against the just rights of the Plaintiffs in Error and of each of them for the following reasons:

The Court erred in sustaining the demurrer to the amended petition.

First. The petition stated that the land in suit had been patented to David Lykins by the United States; that he had departed this life and left Plaintiffs in Error as his sole heirs and that title to the same had vested in them by inheritance, and they were entitled to recover from Defendant in Error who was in possession.

Second. The attempted conveyance of David Lykins was void; never had been approved by the Secretary of the Interior during the lifetime of the said Lykins.

Third. This land, having under the treaty of May 30th, 1854, been allotted to David Lykins for himself and family, could not have been sold by him alone.

He owned same for the joint benefit of himself and family.

Fourth. The attempted conveyance of David Lykins was never delivered as a completed deed, and intended to convey during his life time.

Fifth. The statute of limitation is no defense to this suit.

FIRST POINT.

The petition stated a good cause of action, and the demurrer should have been overruled, unless the attempted sale of David Lykins, approved after his death, passed title to the same.

The real question presented is as to the power of the Secretary of the Interior to approve the deed, so as to make it a valid conveyance, after the death of the grantor. The land involved was conveyed to David Lykins, or Ma-cha-co-me-yah, under a patent issued to him by the United States, under the provisions of an act of Congress approved March 3rd, 1859 (U. S. Statutes, Vol. 11, Page 430) which said act was passed in carrying out the provisions of the treaty, concluded on the 30th day of May, A. D. 1854, between the United States and the Kas-kas-kia and Peoria, Pinakeshaw and Wea Indians (Revisions of Indian Treaties, Page 426), and the said patent, as prescribed by the Secretary of the Interior, under the provisions of the 11th section of said act contained a clause which is as follows, viz: "Said tracts shall never be sold or conveyed by the grantee, or his heirs, without the consent of the Secretary of the Interior, for the time being."

This patent conveyed to the allottee a title in fee simple. In describing an estate conveyed under a similar law the Supreme Court says: "The title conveyed Hurr by the patent was a fee simple; that is, it was all the title or interest in the land; no one shared this title or any interest in it, and it descended or would have descended, to his heirs. The restriction of his right to convey did not deprive the title of the character of a fee simple estate. An estate in fee simple is where a man has an estate in lands or tenements, to him and his heirs forever."

Libby vs. Clark, 6. Sup. Rept., 1045.

The title was not in the United States in trust for him, as in many cases, or in him and the United States jointly, but was in him alone. He and he only could sell it. His power of sale was limited to sale made with the consent of the Secretary, but still any sale made would be his act and deed and not that of the Secretary.

The Secretary could not, at his request, make sale of the land. A deed, to be operative, must be the act of the grantor, with the consent of the Secretary, and the validity of the same should be deter-

mined by the law applicable to all other conveyances, viz: To be operative as a conveyance, it must be complete during the lifetime of the grantor. It is a fundamental principle of the law, that needs no citation of authorities to support, that in order for a deed to be good as a conveyance, it must be signed, sealed and delivered during the lifetime of the grantor. Unless delivered it will be invalid, although signed and sealed. It is not complete until delivered and till complete in every way is not effectual to convey any interest.

An Indian deed to be valid must be signed, sealed, delivered and approved during the lifetime of the grantor. Approval is as essential to the validity of the deed as is signature or delivery. And if one can not be done after the death of the grantor; neither can the other, without signature and delivery, it is void, so also without approval.

Making and sending a deed to the Secretary, for his approval, was not as strong as giving him a power of attorney to sell, and that would have been revoked by death. *Hunt vs. Rousmanier*, 8 Wheat., 175. In the case just cited there was a power of attorney given to secure the payment of certain notes, and it was held that the death of the grantor deprived the attorney of all power. He could not make an effectual sale for a dead man. A deed by an attorney in fact executed before, but delivered after, the death of the principal is inoperative. *Kent vs. Cecil*, 25 So. Western, 715. The above decision was rendered in Texas, where it is held that, if the attorney has power to convey, the conveyance is binding on the principal, and conveys his title, though the conveyance be made without reference to him. *Trinity Co. Lumber Co. vs. Pinckard*, 23 So. Western, 720, and cases cited. Now, if an attorney who has the right to sell in his own name, without referring to his principal, can not after executing the deed, make the same valid, by handing to the grantee, after the death of the principal, how much less can the deed of the Indian be made to pass his title, by an approval of a deed in his name, after his death, especially when we consider that the Secretary could not make the deed himself, as could the attorney, and at most only had the authority to consent that the Indian might make a sale? Why could not the deed of the attorney be held good by a fiction of the law as well as this? His power to act was terminated by death, and being gone, could not be extended or lengthened by the doctrine of relation. So, in this case, the power to act terminated with the death of the grantor.

After his death, nothing could be done in his name or behalf. He could neither ask nor be granted consent to sell. *At his death all of his acts were complete, or must be left incomplete for all time to come.*

In this case there is nothing to show that the grantor ever requested the Secretary to consent for him to sell, either by sending a deed for approval, or otherwise, or that he ever authorized any one to do it for him. The most that can be assumed is that the grantor attempted to make a sale, without the approval of the Secretary, which sale was ineffectual, and that after his death some one procured the approval of his deed, without the knowledge or consent of the heirs. There is nothing showing that the approval of this deed was ever contemplated till after the death of the grantor.

Approving the deed without the request of the heirs or the grantor, and after the death of the grantor, was simply an attempt to make an invalid deed valid. Such a power has not been vested in the Secretary; he could only consent for the Indian to make a deed himself. If this deed had received the approval of the Secretary during the lifetime of the grantor it might, and probably would, by a fiction of law, be held to have been effectual as of its date. But this would have been a pure fiction of the law and is never indulged when it will violate fundamental principles, as would be done in this case. Again, if the Secretary did not have the authority to approve a deed of a dead man, his act could not be made good by a retroactive ratification. It is only when the act done is lawful in itself, and there is a question as to the time when it shall be operative, that this principle of the law can be invoked, and not when the act itself has to be dated back to make it valid. The question in this case is wholly unlike one where the grantee has died. In such a case we can see no good reason why the instrument could not be held to be effective. In such cases the grant would inure to the heirs or assigns of the grantee. This has been held in many cases both in Kansas and elsewhere. Several patents issued by the United States after the death of the grantee being made operative to convey the title to the heirs. But I think no case can be found in the books where the deed of a dead man has been approved or validated after his death, so as to divest the title once vested in his heirs. Of course, there are cases where a deed, perfect in itself, has been delivered to a third party, to be delivered to the

grantee, that have been held operative, although not handed to the grantee himself till after the death of the grantor. But in all of those cases it will be found that the deed was perfect in itself, did not lack signature, approval or any other formality, was intended as a present transfer, and by parties who at the time, had the right to make it. Here the deed itself incomplete, the grantor, without the consent of the Secretary, did not have the right to make the same; the deed at the time of the grantor's death was imperfect, incomplete and ineffectual to convey anything. David Lykins never, during his lifetime, had the consent of the Secretary to sell, without which he could not have made a valid sale. Never having had authority to sell, the land at his death descended to his heirs. The title can regularly pass out of the person in whom it is vested only by a conveyance in his own name, and this can not be executed by another for him when he could not do it himself. A conveyance in the name of a person who was dead at the time would be a manifest absurdity. *Hunt vs. Rousmanier*, 8 Wheat., 202. The decisions hold that the retroactive efficacy of the ratification is subject to this qualification, the intervening rights of third persons can not be defeated by the ratification. This proposition is clearly laid down in the cases of *Pickering vs. Lomax*, 12 Sup. Repts., 866, and *Murry vs. Wotten*, 17, Wend., 531. In this case up to the death of the grantor, David Lykins, the deed was void. In relation to an unapproved deed, the Supreme Court of Kansas uses this language: "In this case Early has no power to convey his land, except with the consent of the Secretary of the Interior, and as that consent was never obtained, said attempted conveyance must, of course, be void." *Clark vs. Akers*, 16 Kans., 166. In this case a deed made to the second purchaser who had full knowledge of the first attempted sale was held good. See also to the same effect:

McGannon vs. Straightledge, 37 Kans., 506.

Pennock vs. Monroe, 5 Kans., 578.

Comm'rs of Miami Co. vs. Wan-zop-pe-che, 3 Kans., 364.

The Kansas Indians, 5 Wal., 164.

Stevens vs. Smith, 2 Kans., 243.

Stevens vs. Smith, 10 Wall., 321.

Then, if the conveyance, without the approval of the Secretary, was at the death of the grantor, void, the title at once vested in his heirs. If, for any reason the deed was not sufficient to convey the title at that time this result would follow. If at the time of his death it was in his heirs; no subsequent act could divest them of their rights without their consent. To hold that the act of the Secretary in attempting to validate this deed caused it to be operative so as to divest the heirs of the title once vested would be in violation of the fifth amendment to the Constitution of the United States, as depriving them of their rights without due process of law. The rights of the plaintiffs clearly intervened between the original making of the deed and the attempted approval. There were two ways that the rights of third parties might intervene—one by purchase and the other by inheritance. Either would be sufficient to prevent any fiction of the law declaring the deed approved long after its execution from being effective from its date. There is no question but what these plaintiffs could have successfully maintained an ejectment suit for this land months after the death of their ancestor, and once having that right, they could not be deprived of it but by some act of their own. The doctrine of relation is a fiction of law and can not be operative upon a void agreement. *Doe vs. Howland*, 8 Cow. (N. Y.), 227.

"A thing of void can not be made good by relation."

Kansas City vs. O'Connor et al., 82 Mo. App., 655, 622.

SECOND POINT.

There was no delivery of the deed as a completed instrument. It was not ready for delivery before approval, simply handing to the grantee when not complete as a conveyance is not a sufficient delivery. The deed was void, not voidable. "The former are prohibited from being made, while the latter are not prohibited from being made, but from being enforced, and are not void, this being prohibited from being made, was void."

Kansas City vs. O'Connor et al., 82 Mo., App., 655.

In the case of *People vs. Van Ness*, 79 Calif., 85 (12 Am. St. Repts., 134), this principle is advanced, viz: "There was no delivery of the second official bond of Van Ness until the day on which it was approved. We can not see how there could have been any delivery until that date. The bond was not in condition to be delivered till

that date; prior to that time it was inchoat and imperfect as a bond.', Now, this deed not being operative till approved, should not be presumed to have been delivered till official approval of the same, which was after the death of the grantor, and hence too late. In the absence of all evidence it should be presumed to have been delivered after approval, and not before. "It is an essential prerequisite that the instrument in question should be understood by the parties to be completed and ready for delivery in order to have a mere placing it in the hands or possession of the grantee or his agents construed into a delivery.

Powell vs. Banks, 146 Mo., 620-623.

Washburn on Real Property (4 E. D.), 292.

"Clearly when it is said that the delivery of an instrument is complete when the grantor has parted with his control over it with intent that it shall pass to the grantee, it is meant that the grantor's intent is to deliver the instrument in the condition in which it is at the time, also that the grantee's assent thereto."

Powell vs. Banks, Supra, 634

THIRD POINT.

The land was allotted under the provisions of the treaty between the United States of America and Kas-kas-kia, Peoria and other confederated tribes of Indians, concluded on the 30th day of May, 1854, proclaimed August 10th, 1854 (U. S. Statutes, Vol. 10,) and was for the benefit of the said David Lykins, and his family. The rights of the said allottees, are to be determined by the treaty itself, and a correct construction of this treaty will show that the total land allotted to this reservee was 800, being 160 acres each, for himself and family, Plaintiffs in Error. Said reservee had no authority or right to sell said land himself. To convey said land a deed would have to be made by all parties interested.

FOURTH POINT.

The statute of limitations is no defense to this suit.

McGannon vs. Straightledge, 37 Kans., 506.

Respectfully submitted,

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